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Supreme Court of the United States

October Term, ~~1901~~ 1902

No. ~~512~~ 219.

THE TERRITORY OF HAWAII

Appellant

against

OSAKI MANKICHI

Appellee

ADDITIONAL BRIEF FOR APPELLEE

GEORGE A. DAVIS AND
F. M. BROOKS
Attorneys for Appellee

PAUL FULLER,
F. R. COUDERT, JR.
Of Counsel

Supreme Court of the United States.

THE TERRITORY OF HAWAII,
Appellant,

AGAINST

OSAKI MANKICHI,
Appellee.

OCTOBER TERM,
~~1901.~~ 1902.
No. ~~519.~~ 219.

ADDITIONAL BRIEF FOR APPELLEE.

This is an appeal by the Territory of Hawaii from an order of the United States District Court in and for the Territory of Hawaii, under date of September 12, 1901, upon a writ of *habeas corpus*, discharging from custody the appellee, Osaki Mankichi, who had been convicted of manslaughter in the Circuit Court, for the First Judicial Circuit of the Territory of Hawaii, by the verdict of nine jurors out of twelve (Rec., p. 7).

The trial was had upon a presentment or indictment by the Attorney-General of Hawaii, certified as a true bill by the presiding Judge of said Court (Rec., pp. 8 and 9). This proceeding was in accordance with Sec. 616 of the Penal Laws of 1897 of the Republic of Hawaii (Rec., p. 15).

The verdict of conviction of manslaughter rendered by nine out of twelve jurors was in accordance with Sec. 1345 of the Civil Laws of 1897,

of the Republic of Hawaii. The discharge of the prisoner was granted on the ground that these two municipal laws of the former Republic of Hawaii ceased to be of any force or effect upon the annexation of the Hawaiian Islands "as a part of the territory of the United States and subject to the sovereign dominion thereof" by virtue of a Joint Resolution of the Congress of the United States, approved by the President, July 7, 1898 (30 Stat., 750).

The Joint Resolution referred to, after reciting the consent of the Government of the Republic of Hawaii "to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies," accepted, ratified and confirmed said cession, and provided "that the said Hawaiian Islands and their dependencies be and *they are hereby annexed* as a part of the territory of the United States, and are subject to the sovereign dominion thereof."

The Resolution then provided that "the municipal legislation of the Hawaiian Islands, not enacted for the fulfilment of treaties extinguished, and not inconsistent with this joint resolution, *nor contrary to the Constitution of the United States*, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

The resolution further provided that the existing laws of the United States relative to public lands should not apply in the Hawaiian Islands, but that Congress should enact special laws for their management and disposition; that until legislation should be enacted extending United States customs laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries should remain unchanged; that there should be no further immigration of Chinese into the Hawaiian Islands except upon the conditions allowed by the laws of the United States; and it then provided for

the appointment of five commissioners "who shall as soon as reasonably practicable recommend to Congress such legislation conerning the Hawaiian Islands as they deem necessary or proper."

The questions before this Court on the present appeal are therefore:

I.—Did the Joint Resolution of Congress, approved by the President on the 7th of July, 1898, repeal and abrogate all municipal legislation of the Hawaiian Islands that was "contrary to the Constitution of the United States"?

II.—Is it or not contrary to the Constitution of the United States that any person should be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, and that in a criminal prosecution a conviction should be had by the verdict of nine jurors?

I.

(1.) It seems to us that this question is answered by its mere statement.

The first canon of interpretation is to take the ordinary meaning of plain and unambiguous language. The language of Congress in the Joint Resolution under discussion is certainly plain and unambiguous, and provides that only that municipal legislation of the Hawaiian Islands "*shall remain in force*" which is "not inconsistent with this joint resolution nor contrary to the Constitution of the United States."

Comment on this paragraph can only, it would seem, confuse or dilute its obvious meaning. It expresses a direct intention in direct language, to wit, that no municipal legislation should "remain in force," should be carried out, should be of any vir-

tue or effect, which was inconsistent with, in contravention of, contrary to, any relevant prescription of the Constitution.

What is a relevant or applicable prescription of the Constitution is the subsidiary question suggested.

Assuming for the moment that some rights are so essential and fundamental that the protection extended to them by the letter or the spirit of the Constitution is everywhere and at all times available, while other rights are artificial or remedial and only protected at such times and such places as the Constitution specifically indicates, we will test the meaning and the application of the Joint Resolution by an enumeration of the rights which depend upon the adoption of certain methods of procedure for their assertion and protection.

> "The right of the people to be secure in their "persons, houses, papers and effects against "unreasonable searches and seizures shall "not be violated; and no warrants shall "issue but upon probable cause supported by "oath or affirmation, and particularly describ-"ing the place to be searched and the persons "and things to be seized" (Art. IV. Amendments).

Here is clearly a right depending upon proper procedure; the search or the seizure must not be "unreasonable"; the warrant must not be issued except upon the oath or affirmation of a complainant, and this oath must be specific as to the place to be searched, the things to be searched for and taken, and the persons to be seized.

Would a municipal law of Hawaii, allowing search warrants and seizures without oath or affirmation, but upon the simple fiat of Attorney-General or Judge, and without particular description of "the place to be searched and the persons or things to be seized," be contrary to the Constitution? Would it "remain in force" after the annexation of Hawaii

under the Joint Resolution which declared that only municipal legislation " not contrary to the Constitu- " tion of the United States should remain in force."

Consider in the same way these provisions:

No person shall be compelled in any criminal case to be a witness against himself (Art. V. Amendments).

The accused shall be informed of the nature and cause of the accusation (Art. VI. Amendments);

He shall be confronted with the witnesses against him (Art. VI. Amendments);

He shall have compulsory process for obtaining witnesses in his favor (Art. VI. Amendments);

He shall have the assistance of counsel in his defense (Art. VI. Amendments);

Would Hawaiian legislation compelling the accused to testify against himself; refusing him information as to the nature and cause of the accusation against him; taking testimony against him by depositions of witnesses with whom he was not confronted; denying him compulsory process to obtain witnesses in his favor and not allowing him the assistance of counsel in his defense, " remain in force " under the Joint Resolution?

All these relate to what Justice Brown in *DeLima v. Bidwell*, 182 U. S., p. 282, classifies as " artificial or remedial rights," as " particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo Saxon Jurisprudence," and which do not, as then decided, necessarily attach to territory annexed by a mere treaty cession.

But can there be any doubt of the power of Congress to attach them to such territory, or any doubt of the intention of Congress so to attach them by the beneficent provision of the Joint Resolution?

The question is important and further illustration is not out of place.

The Constitution prescribes that " no per- " son shall be convicted of treason on the tes-

"timony of two witnesses to the same overt "act" (Art. III., Section 3).

"No person shall be deprived of life, liberty "or property, without due process of law; nor "shall private property be taken for public "use without due compensation" (Art V., Amendments).

Would municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by the will of the Legislature and without process, or confiscating private property for public use without compensation remain in force after an annexation of the territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?

In what way does the right claimed by the appellee differ from the rights enumerated above?

The trial of all crimes shall be by jury (Art. III., Section 2):

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury" (Art. V., Amendments).

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury" (Art. VI., Amendments).

The rights protected by these provisions are no more "artificial and remedial," no more dependent upon "particular methods of procedure" than the instances already presented, and we respectfully submit that they stand the test imposed by the language of the Resolution—any law infringing them is "contrary to the Constitution"; in other words, such a law ignores the existence of a right capable of assertion against any agency of the Federal Government; and Congress chose to invest

the inhabitants of Hawaii with such constitutional rights.

Further illustration with reference to those more broadly recognized human rights which have occasionally been referred to as "Natural rights," essential or fundamental rights, would seem to be unnecessary, especially as the distinction between such rights and what we have accepted for the moment as merely "artificial or remedial rights" is wavering and uncertain. A recapitulation, however, may not be out of place by way of emphasis.

Surely legislation of Hawaii prescribing that a man may be held to involuntary servitude otherwise than as a punishment for crime; any legislation respecting an establishment of religion or prohibiting the free exercise thereof; abridging the freedom of speech or of the press, or of the right of the people peaceably to assemble; prohibiting the people to keep and bear arms; permitting soldiers to be quartered in any house without the consent of the owner in time of peace; permitting the requirement of excessive bail, the imposition of excessive fines and the infliction of cruel and unusual punishments; prescribing a religious test as a qualification for any of the civil, judicial or military offices of the existing government in the Hawaiian Islands, which by the resolution were vested in such person or persons as the President of the United States might designate; any legislation prescribing that the right to vote shall be denied to Caucasians, would surely be contrary to the Constitution and come under the ban of the Joint Resolution and cease to be of any force or effect.

(2.) Another rule of interpretation which does not require citation of authority in this Court is that effect is to be given to every portion of a statute; that all the language used in a statute is presumed to have been used for effective purpose and that interpretation will be sought and sustained which gives to every provision an actual effect.

Any attempt to circumscribe or diminish the plain intent and purpose of the unequivocal language, "nor contrary to the Constitution of the United States," is equivalent to the elimination of those words from the Joint Resolution.

It has been intimated that there are certain "fundamental" rights which of necessity attach to all territory and to all people under the jurisdiction of the United States, and that those rights became at once enforcible in the Hawaiian Islands upon their annexation to the United States, but that certain other prescriptions of the Constitution are only meant to apply to territory which has assumed some other relation to the Federal Union than that of merely annexed territory.

There might under other circumstances be room for discussion of such a proposition, but to advance such a proposition as applicable to the present case, in presence of the broad language of the Resolution,—that no municipal legislation should "remain in force" that was contrary to any prescription of the Constitution, would be to adopt a rule of interpretation contrary to that which has been universally accepted,—a rule of interpretation which could be used to diminish, if not to abolish, every protection intended to be secured by Constitutions or by Laws.

Whatever questions might arise as to the protection due to denizens of annexed territory, under other circumstances,—such as mere acquisition without any action of Congress,—or as to the propriety or the justice of extending to such annexed territory provisions of law and of constitutional rights originally intended for people of the Anglo-Saxon race and brought up under the liberalizing influences of Magna Charta and the common law, it is manifest that in the instance of Hawaii, Congress intended that there should be no room for discussion, and intended to confer upon its inhabitants every constitutional privilege, immunity and protection which the Constitution enjoins upon

or empowers the Federal authority to extend, to all under its administration.

To hold otherwise is to expunge from the Resolution the saving clause which ensured to every American citizen who chose to go into the new territory the protection which Congress meant to attach to it instantly, and as the unavoidable condition of its annexation.

(3.) Another rule of interpretation is a comparison of this Act of Congress with other Acts of the same body, meant to convey or to withhold from given territory, rights such as we claim to exist in the case at bar.

The Organic Law of Iowa came under consideration in the case of Webster *v.* Reid, 11 How., 460, and it was there held that the VIIth Article of the Amendments giving the right to trial by jury in all common law cases, was in force in Iowa because the Organic Law had by express provision and by reference extended the Ordinance of 1787 over the territory and the Laws of the United States as far as they were applicable.

The language of the Organic Act (5 Stat., 235, Sec. 12) is as follows:

> "That the inhabitants of the said Territory
> "shall be entitled to all the rights, privileges
> "and immunities hereinbefore granted and
> "secured to the Territory of Wisconsin and
> "its inhabitants, and the existing laws of the
> "Territory of Wisconsin shall be extended
> "over said territory so far as the same be
> "not incompatible with the provisions of this
> "Act."

The Organic Act of Wisconsin (5 Stat., p. 10, Section 12) provides:

> "That the inhabitants of the said Territory
> "shall be entitled to enjoy all and singular
> "the rights, privileges and advantages granted
> "and secured to the people of the territory of

"the United States Northwest of the River "Ohio, by the articles of compact contained "in the Ordinance for the government of the "said territory passed on the 13th of July, "1787." And that Ordinance provided that "the inhabitants of the said territory shall "always be entitled to the benefits of the writ "of *habeas corpus* and of the trial by jury," and that "no man shall be deprived of his "liberty or property but by the judgment of "his peers" (Article II.).

We submit that though this language is more extensive it is not more comprehensive than the simple language of the Joint Resolution providing that the "municipal legislation of the Hawaiian Islands, not contrary to the Constitution of the United States, shall remain in force." Especially when the Joint Resolution adds to this particular exceptions and designates certain legislation which shall remain in force, such as the customs laws.

The Organic Law of Utah (9 Stat., 453), provides in Section 6 that the legislative power of the territory shall extend to all rightful subjects of legislation "consistent with the Constitution of the United States and the provisions of this Act," and in the final section of the Law (Section 17) it is further provided that the "Constitution *and laws* of the United States are hereby extended to and declared to be in force in said territory of Utah so far as the same, or any provision thereof, may be applicable."

The same comment may be made upon this that was made upon the Iowa Act. The expression of the intention of Congress is amplified, but it is not strengthened; it embraces no more, although it takes more words to do it.

The Organic Law of Hawaii (30th April, 1900, 31 Stat., 141) devotes two sections to the re-enactment of the provision of the Joint Resolution:

"SECTION 5. That the Constitution, and "except as hereinafter provided, all the laws

> " of the United States which are not locally
> " inapplicable, shall have the same force and
> " effect within the said territory as elsewhere
> " in the United States, provided that Section
> " 1850 and Section 1890 of the Revised Statutes
> " of the United States shall not apply to the
> " Territory of Hawaii."

The necessity for this amplification is seen in the fact that not the Constitution alone but "the laws" of the United States were being made applicable, and not all of these, but with exceptions that had to be duly noted.

But to make assurance "double sure" Congress did not content itself with this provision as to the Constitution, but had recourse in another Section to language identical in purpose and meaning with the language of the Joint Resolution, to wit:

> " SECTION 6. That the laws of Hawaii not
> " inconsistent with the Constitution or laws
> " of the United States, or the provisions of
> " this Act, shall continue in force, subject to
> " repeal or amendment by the legislation of
> " Hawaii or the Congress of the United
> " States."

The only difference between this and the provisions of the Joint Resolution is that the Resolution refers to legislation not inconsistent with the Joint Resolution, and the Organic Act of 30th April, 1900, refers to legislation not inconsistent with the provisions of the Act, but the language by which the legislation of Hawaii was abrogated or allowed to remain in force was in nowise different from the language of the Joint Resolution; the one said "not contrary to the Constitution" and the other "not inconsistent with the Constitution."

We may now contrast the language of the Joint Resolution, making the Constitution of the United States the test of the validity of legislation, with the

action of Congress when it had no intention of applying this test.

The Foraker Act, April 12, 1900, provided for the civil government of Porto Rico. The question of constitutional rights and immunities was paramount in the public mind and dominated the discussions in Congress; and Congress provided (Section 8), "that the laws and ordinances of Porto Rico now in force shall continue in full force and effect except as altered, amended or modified hereinafter, or as altered or modified by military orders and decrees in force when this Act shall take effect, *and so far as the same are not inconsistent or in conflict with the statutory laws of the United States*, not locally inapplicable, or the provisions hereof."

Civil Government for the Philippines was provided by the Act of July 1, 1902, and the same question of constitutional privileges was still paramount in the public mind. Congress met the situation, not by the simple and sweeping provision of the Joint Resolution concerning Hawaii, but, by the adaptation of such a Bill of Rights as it considered proper for the Islands, which was embodied in Section 5 of the Act and insures to the inhabitants the equal protection of the laws and due process of law; protects accused against excessive bail, against being compelled to testify against himself and gives him the privilege of counsel and of confrontation with the witnesses against him, but does not secure to him the protection of a grand jury nor the privilege of a trial by his peers.

Had Congress so desired and so intended, the Joint Resolution could have been expressed in the language of the Porto Rico or the Philippine Act, and we submit that it suffices to place the two in juxtaposition, to make certain that it was the plain intent of Congress from the moment that it made Hawaii a part of our domestic territory to carry there every provision of the Constitution which could in any way be invoked or made applicable.

The reason for this distinction is apparent in the history of the Hawaiian Islands, and in the fact of its American colonization and the prevalence there of the rules of the Common Law.

II.

Is it or not contrary to the Constitution of the United States that any person should be held to answer for a capital crime unless on a presentment or indictment of a Grand Jury, and that in a criminal prosecution a conviction should be had by the verdict of nine members of the jury?

THE GRAND JURY.

> Art. 5. of the Amendments is in precise language: "No person shall be held to an- "swer for a capital or otherwise infamous "crime unless on a presentment or indict- "ment of a Grand Jury."

In *ex parte* Bain, 121 U. S., p. 1, the Supreme Court has held that this prescription of the Constitution is not observed when an indictment found by a Grand Jury is amended by the Court, even by striking out what the Court calls surplusage. Compliance with the constitutional requirement demands the untrammeled action of the Grand Jury and an indictment which expresses that action in its integrity.

> "There is the positive and restrictive lan- "guage of the great fundamental instrument "by which the National Goverment is organ- "ized, that no person shall be held to answer "for such a crime 'unless on a presentment "'or indictment of a grand jury'" (p. 6).

"It is never to be forgotten that in the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument. Undoubtedly the framers of this article had for a long time been absorbed in considering the arbitrary encroachments of the crown on the liberty of the subject and were imbued with the common law estimate of the value of the Grand Jury as part of its system of criminal jurisprudence. They, therefore, must be understood to have used the language which they did * * * in the full sense of its necessity and of its value. We are of the opinion that an indictment found by a grand jury was indispensable to the power of the Court to try the petitioner for the crime with which he was charged" (pp. 12 and 13).

THE PETIT JURY:

In Thompson *v.* Utah, 170 U. S., at page 349, the Court says: "The next inquiry is whether the jury referred to in the original Constitution and in the VIth Amendment is a jury constituted as it was at common law of twelve persons, neither more nor less. This question must be answered in the affirmative. When Magna Charta declared that no freeman should be deprived of life, &c., 'but, by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors. * * * When Thompson committed the offense of grand larceny in the Territory of Utah—*which was under the complete jurisdiction of the United States for all purposes of government and*

"*legislation*—the Supreme Law of the land
" required that he should be tried by a jury
" composed of not less than twelve persons"
(p. 350).

" When Thompson's crime was committed
" it was his constitutional right to demand
" that his liberty should not be taken from
" him except by the joint action of the Court
" and the unanimous verdict of a jury of
" twelve persons" (p. 351).

To the same effect is

Springville *vs.* Thomas, 166 U. S., 707.

We recall the warning given on occasions by this Honorable Court against over quotation from their own decisions and refrain from what Justice Miller called the " vainest show of learning " by further citations in support of these now elementary propositions.

If the Joint Resolution of Congress meant anything, it surely meant that instantly upon the annexation of the Hawaiian Islands no legislation in any way contrary to the Constitution of the United States, in any way interfering with the personal rights of life, liberty or property should " remain in " force."

That it had the power to do this has not been questioned. That it did this cannot be questioned.

The Insular Cases which have been cited to sustain a contrary proposition, did nothing more than to assert the omnipotent power of Congress over annexed territory; its power to grant or to withhold constitutional privileges, rights and immunities; this is not the time to quarrel with or question the doctrines there asserted, for, such as they are, they do not interfere with the rights of Mankichi, the appellee herein. In his case the power attributed to Congress was exercised and the conditions upon which the Hawaiian Islands were

to be received as part of our domestic territory were plainly stated and their plain statement carried to every person accused of crime in the Hawaiian Islands after the annexation and the operation of the Joint Resolution, the right to be accused by a Grand Jury and the right to a trial by a Common Law Jury of twelve men.

If this be true the decision of the learned Judge of the District Court in Hawaii was sound, and the order discharging the prisoner from custody should be affirmed.

Dated New York, February 24th, 1903.

GEORGE A. DAVIS, and
F. M. BROOKS,
Attorneys for Appellee.

PAUL FULLER,
F. R. COUDERT, JR.,
Of Counsel.